Supreme Court, U.S.
FILED
941524 MAR 15 1995
No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JAMES P. TURNER, GRADY KEITH, CYNTHIA D. BROWN, and PEGGY ROSSER,

Petitioners,

vs.

JAMES A. GILES,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. BOWERS
Attorney General

WILLIAM C. JOY
Senior Assistant Attorney General

WILLIAM M. DROZE
Assistant Attorney General

Please Address All Communications To:

WILLIAM M. DROZE
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3303

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

53 pp

QUESTION PRESENTED

May a state court which elects to entertain an action under 42 U.S.C. § 1983 apply state law to deny a public official the right to immediate appellate review of an adverse determination of his qualified immunity from suit when federal courts considering identical actions must treat such rulings as a collateral order and allow immediate appellate review pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 8

I. Introduction 8

II. The Decision Of The Supreme Court Of Georgia Conflicts With Precedents Of This Court 9

III. The States Are In Conflict Regarding The Availability Of Immediate Appellate Review After An Adverse Qualified Immunity Determination 13

CONCLUSION 16

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986) 14

Breault v. Chairman of the Board of Fire Commissioners, 513 N.E.2d 1277 (Mass. 1987) 14

Brown v. Diaz, 184 Ga. App. 409, 361 S.E.2d 490 (1987) 13

Carillo v. Rostro, 845 P.2d 130 (N.M. 1992) 14

Cohen v. Benef. Indus. Loan Corp., 337 U.S. 541 (1949) 10, 11, 12

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 11

Corum v. University of North Carolina, 413 S.E.2d 276 (N.C. 1992) 14

Durso v. Taylor, 624 A.2d 449 (D.C.App. 1993) 14

Fann v. Brailey, 841 S.W.2d 833 (Tenn.App. 1992) 14

Felder v. Casey, 487 U.S. 131 (1988) 12, 13, 15

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 12

Henke v. Superior Court, 775 P.2d 1160 (Ariz.App. 1989) 13

Hepner v. Southern Railway Co., 182 Ga. App. 346, 356 S.E.2d 30 (1987) 13

Howlett v. Rose, 496 U.S. 356 (1990) 14

Klindtworth v. Burkett, 477 N.W.2d 176 (N.D. 1991) 14

Lord v. Murphy, 561 A.2d 1013 (Me. 1989) 14

Martinez v. California, 444 U.S. 277 (1980) 15

TABLE OF AUTHORITIES – Continued

Page

McLin v. Trimble, 795 P.2d 1035 (Okl. 1990) 14

Mitchell v. Forsyth, 472 U.S. 511 (1985) ...10, 11, 12, 13, 15

Noyola v. Flores, 740 S.W.2d 493 (Tex.App. Corpus Christi 1987) 14

Ohio Civil Service Employees Ass'n v. Moritz, 529 N.E.2d 1290 (Ohio App. 1987) 14

Park County v. Cooney, 845 P.2d 346 (Wyo. 1992)..... 14

Pizzato's Inc. v. City of Berwyn, 523 N.E.2d 51 (Ill.App. 1 Dist. 1988) 14

Richardson v. Chevrefils, 552 A.2d 89 (N.H. 1988)..... 14

Robinson v. Beaumont, 725 S.W.2d 839 (Ark. 1987) 13

Scroggins v. Edmondson, 250 Ga. 430, 297 S.E.2d 469 (1982) 12

Scruggs v. Georgia Department of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991) 9

Tucker v. Resha, 610 So.2d 460 (Fla.App. 1 Dist. 1992)..... 14

STATUTES AND REGULATIONS

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983..... *passim*

O.C.G.A. § 5-6-34(b) 9

O.C.G.A. § 9-11-54(b) 9, 10

O.C.G.A. § 9-11-56(h) 9

20 U.S.C. § 107..... 4

No. _____

In The

Supreme Court of the United States

October Term, 1994

JAMES P. TURNER, GRADY KEITH, CYNTHIA D. BROWN, and PEGGY ROSSER,

Petitioners,

vs.

JAMES A. GILES,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App., *infra,* A1) is reported at 264 Ga. 812, 450 S.E.2d 421 (1994).

JURISDICTION

The Supreme Court of Georgia issued its opinion below (App., *infra,* A1) on December 5, 1994. The Court denied the Petitioners' motion for reconsideration on December 20, 1994. (App., *infra,* A25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 5-6-34 of the Official Code of Georgia Annotated provides in significant part as follows:

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

> (1) All final judgments that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;
>
> (2) All judgments involving applications for discharge in bail trover and contempt cases;
>
> (3) All judgments or orders directing that an accounting be had;
>
> (4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;
>
> (5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;
>
> (6) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;
>
> (7) All judgments or orders refusing applications for dissolution of corporations created by the superior courts; and

(8) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the

application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

STATEMENT OF THE CASE

James A. Giles (hereafter "Respondent") is a blind vendor licensed under the auspices of the Randolph-Sheppard Act, 20 U.S.C. § 107 *et seq.*, which provides for employment of blind persons on federal and other property.

All of the Petitioners are employees of the Georgia Department of Human Resources. The Department is the state agency which oversees the Division of Rehabilitation Services, an internal division of the Department designated as the state licensing agency for purposes of the Randolph-Sheppard program. In Georgia, this program is generally known as the Business Enterprise program. Petitioner Cynthia Brown is a Business Enterprise Supervisor. She is responsible for the supervision of 14 licensed blind vendors and 11 vending facilities, including the facility managed by Respondent. Petitioner Grady W. Keith supervises nine Business Enterprise Counselors, including Ms. Brown, and acts as a consultant to the counselors to assist them with information, training, or advice on problems which arise in their individual territory or area of responsibility.

Petitioner James P. Turner is the Director of the Business Enterprise Program of the Division of Rehabilitation Services and is responsible for the management of the Randolph-Sheppard program, which includes 13 state staff members, 130 licensed blind vendors, and 119 vending locations across the state. Petitioner Peggy D. Rosser is the Deputy Division Director of the Division of Rehabilitation Services, and manages four major organizational programs of the Division which include the Disability Adjudication Section, Business Enterprise Program, Georgia Industries for the Blind, and the state office management staff, including supervision of Petitioner Turner.

After concerns were raised regarding Respondent's management of his vending facility, Petitioners Brown and Keith discussed Respondent's performance at his vending facility and Petitioner Brown proposed that his license be terminated for negligent and inefficient operation of the vending facility. Petitioner Keith concurred in the recommendation and it was approved by Petitioner Turner. A termination letter was issued to Respondent on January 17, 1992 by Petitioner Brown. Thereafter, on February 5, 1992, Respondent requested an administrative review of the termination decision, which was held on March 5, 1992. On March 23, 1992, the termination decision was upheld and Respondent requested a full evidentiary hearing on his termination. That hearing was held June 22, 23, 24; August 17-30; and September 1, 1992.

On November 11, 1992, the administrative law judge found against the state licensing agency and ordered that Respondent be reinstated to his position with back pay. Respondent was reinstated to his position effective

November 16, 1992, and he received and accepted payments of $36,766.90 in full settlement of the back pay award. On December 21, 1992, the Commissioner of the Georgia Department of Human Resources considered the agency's appeal on the initial hearing decision and upheld Respondent's reinstatement and back pay award. The Commissioner did not necessarily agree with all the initial factual and legal findings, however, and he did modify the initial order to the extent that it required the agency to combine two vending facilities and to seek clarification of a federal rule. Respondent sought judicial review of the Commissioner's ruling and the Superior Court of Fulton County reinstated the initial decision of the administrative law judge. That matter is the subject of ongoing litigation collateral to the present case.

In addition to his administrative appeal, Respondent filed the present action in the Superior Court of Fulton County alleging a violation of his civil rights under 42 U.S.C. § 1983. Due to a venue question, the action was transferred to the Superior Court of DeKalb County by agreement. On May 2, 1994, the trial court issued its order denying Petitioners' motion to dismiss or for summary judgment. (App., *infra*, A10). Among other things, this order denied Petitioners qualified immunity for their actions in terminating Respondent's license. In accordance with the interlocutory appeal procedure in Georgia, the trial court certified its order for immediate review on May 11, 1994, and the Supreme Court of Georgia approved the filing of an interlocutory appeal. (App., *infra*, A7-9).

Believing that they were entitled to appellate review of the adverse qualified immunity determination, Petitioners also filed an appeal utilizing Georgia's direct appeal statute from the trial court's order independent of the interlocutory appeal. This second appeal was filed to assure review of the qualified immunity issues since consideration of an interlocutory appeal is discretionary in Georgia. In its opinion issued December 5, 1994, the Supreme Court of Georgia dismissed Petitioner's direct appeal, holding that state law controlled the appealability of orders of the state courts, even where a federal cause of action is involved. (App., *infra*, A3).

The Court expressly declined to follow the federal rule that determinations of a public official's qualified immunity constitute a collateral order subject to immediate appellate review. As a consequence, public officials in Georgia have no right of immediate review in state court when a trial court finds that qualified immunity is unavailable to that official. (App., *infra*, A3). Since Petitioners took the additional precautionary step of seeking permission for their appeal under Georgia's interlocutory appeal procedure, (App., *infra*, A9), the Court reached the merits of the case and determined that Respondent was not entitled to a recovery under Section 1983.

This resolution of the appeal does not extinguish the controversy regarding the proper appellate procedure for resolving qualified immunity determinations in state court since Petitioners were denied the right to such review and this situation is capable of repetition, and yet evades review. If an interlocutory appeal is accepted in the discretion of a state court, a public official will never be able to have the question of a right to a direct appeal

resolved. Conversely, the only alternative means of determining that right would be where a public official is denied appellate review and compelled to go to trial notwithstanding a claim of qualified immunity, contrary to federal practice. This alternative disserves the public interest and would unnecessarily postpone consideration of an important question of federal law.

REASONS FOR GRANTING THE PETITION

I. Introduction

Qualified immunity strikes a balance between the interest of an injured party in compensation and the public's interest in independent decision-making by public officials. If every public official were forced to make discretionary decisions in the face of threatened legal proceedings, decision-makers would be effectively paralyzed. To combat paralysis of governmental officials, the courts developed the doctrine of qualified immunity to protect officials who act in an objectively reasonable manner from litigation pertaining to their discretionary decisions.

The decision of the Supreme Court of Georgia in this case deprives public officials of a significant measure of protection from the burdens of civil rights litigation contrary to the intent of qualified immunity. Instead of being assured that an initial trial level determination of immunity is subject to immediate review, public officials in Georgia and other states must depend upon the beneficence of the trial court and appellate court to obtain

interlocutory appellate review. In Georgia, a public official must obtain the permission of the same judge who denied the official qualified immunity in the first place to get such review. By contrast, a public official sued under 42 U.S.C. § 1983 in a federal court in Georgia is entitled to an immediate appeal of an adverse immunity ruling. These contradictory results arising out of the same type of action, but different forum, are exactly what this Court has rejected in its past cases.

Because the states are in conflict concerning the availability of interlocutory appellate review, and because the decision of the Supreme Court of Georgia conflicts with this Court's recognition that a qualified immunity determination is a collateral order subject to immediate appeal, this Court is urged to issue a writ of certiorari and clarify for the bench and bar that appellate resolution of qualified immunity rulings must be uniformly handled by the state and federal courts.

II. The Decision Of The Supreme Court Of Georgia Conflicts With Precedents Of This Court.

Under ordinary civil practice in Georgia, the denial of a motion for summary judgment is not directly appealable. O.C.G.A. § 9-11-56(h). A litigant is required to use the interlocutory appeal procedure set out in O.C.G.A. § 5-6-34(b). Interlocutory appeals involve a two step procedure, certification that the case is deserving of immediate review, and authorization from the appellate court to permit the appeal. *Id.* Both findings are within the discretion of the respective courts. *Scruggs v. Georgia Department of Human Resources*, 261 Ga. 587, 408 S.E.2d 103 (1991).

The difficulty with applying this procedure, or the related discretionary certification of an order as final in part under O.C.G.A. § 9-11-54(b), is that it makes important rights of public officials subject to unfettered discretion. That result is not consonant with the management of claims under 42 U.S.C. § 1983 in the federal courts.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court authorized direct appeals of adverse qualified immunity determinations in federal court finding that its cases:

> recognized **an entitlement** not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.

Id. at 526 (Emphasis Supplied).

The Court's rationale for allowing direct appeal of an interlocutory matter was by use of the "collateral order doctrine", first adopted by the Court in *Cohen v. Benef. Indus. Loan Corp.*, 337 U.S. 541 (1949). *Cohen* recognizes a species of order in federal practice which finally determine rights separable from and collateral to rights asserted in the action, and which are too important to be denied review, and too independent from the cause itself to defer appellate consideration until the whole case is adjudicated. *Id.* at 546. An adverse determination of a public official's qualified immunity falls into this category because the entitlement not to stand trial is lost if not reviewed before the trial commences.

In Division 1 of its opinion, the supreme court concluded that "a pre-trial denial of a claim of qualified immunity is not effectively unreviewable on appeal."

(App., *infra*, A3). Analyzing the identical legal issue, this Court wrote:

> The entitlement is an ***immunity from suit*** rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, **the district court's decision is effectively unreviewable on appeal from a final judgment.**

Mitchell, 472 U.S. at 526-27 (Ital. in Orig.; Bold Supplied).

Another contradiction appears in the supreme court's finding that "an order denying a claim of qualified immunity in a § 1983 action is not substantially separate from the issues raised by the complaint." (App., *infra*, A3). Addressing this point in *Mitchell*, this Court held:

> An appealable interlocutory decision must satisfy two additional criteria: it must 'conclusively determine the disputed question,' *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), and that question must involve a 'clai[m] of right separable from, and collateral to, rights asserted in the action,' *Cohen*, [337 U.S. 541 (1949)] *supra*, at 546. The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements.

Mitchell, 472 U.S. at 527. Thus, this Court held that a qualified immunity determination was sufficiently separable from the underlying controversy to warrant immediate appeal, contrary to the conclusion of the lower court. Ironically, the Georgia Supreme Court adopted the *Cohen* doctrine in *Scroggins v. Edmondson*, 250 Ga. 430, 431, 297 S.E.2d 469, 471 (1982); the same doctrine used to justify an immediate appeal in *Mitchell*.

The supreme court's opinion appears to distinguish *Mitchell* with the statement, "the jurisdiction of the courts of Georgia is not a federal issue upon which the decision of the Supreme Court of the United States in *Mitchell* would be controlling, but derives from the constitutional and statutory law of this state." (App., *infra*, A1-2). Yet, Petitioners submit that this distinction does not square with the later decision of this Court in *Felder v. Casey*, 487 U.S. 131 (1988). In *Felder*, the Court rejected an attempt by a state to limit a Section 1983 action by means of a state statute. Describing the supremacy of federal law, the Court wrote:

> Just as federal courts are constitutionally obligated to apply state law to state claims, see *Erie, supra* [304 U.S. 64 (1938)], at 78-79, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942). . . . A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal

> court within the same State is obviously inconsistent with this federal interest in intrastate uniformity.

Felder, 487 U.S. at 151, 153. Georgia law contemplates the application of the substantive components of federal law, *see Brown v. Diaz*, 184 Ga. App. 409, 410, 361 S.E.2d 490, 491 (1987); *Hepner v. Southern Railway Co.*, 182 Ga. App. 346, 350-52, 356 S.E.2d 30, 34-35 (1987), yet the supreme court declined to apply it here.

For the same reasons expressed in *Felder*, Petitioners assert that applying state rules of appellate procedure to defeat an entitlement to immediate review of qualified immunity decisions would be preempted to the extent that they conflict with the Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Accordingly, this Court is urged to issue a writ of certiorari to the Georgia Supreme Court in order to assure the supremacy of federal law and to vindicate this Court's authority to control the manner in which the state courts resolve the substantive defense of qualified immunity.

III. The States Are In Conflict Regarding The Availability Of Immediate Appellate Review After An Adverse Qualified Immunity Determination.

The majority of states which have considered this question have concluded that a direct appeal should be allowed, either by expansion of existing state laws or by recognizing the binding effect of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), upon their appellate procedures. Those states approving direct appeals are: *Robinson v. Beaumont*, 725 S.W.2d 839 (Ark. 1987); *Henke v. Superior Court*, 775

P.2d 1160 (Ariz.App. 1989); *Durso v. Taylor,* 624 A.2d 449 (D.C.App. 1993); *Lord v. Murphy,* 561 A.2d 1013 (Me. 1989); *Breault v. Chairman of the Board of Fire Commissioners,* 513 N.E.2d 1277 (Mass. 1987); *Anderson v. City of Hopkins,* 393 N.W.2d 363 (Minn. 1986); *Richardson v. Chevrefils,* 552 A.2d 89 (N.H. 1988); *Corum v. University of North Carolina,* 413 S.E.2d 276 (N.C. 1992); *Fann v. Brailey,* 841 S.W.2d 833 (Tenn.App. 1992); *Park County v. Cooney,* 845 P.2d 346 (Wyo. 1992).

Two states allowed review, but not through the mechanism of a direct appeal: *McLin v. Trimble,* 795 P.2d 1035 (Okl. 1990) (not allowing a direct appeal from a denial of summary judgment on the qualified immunity issue but holding that review was proper through an original action); *Carillo v. Rostro,* 845 P.2d 130 (N.M. 1992) (not allowing a direct appeal from a denial of summary judgment on the qualified immunity issue but allowing review through the invocation of the collateral order doctrine invoked through a writ of error). Finally, five states have held that state appellate procedures prevailed: *Tucker v. Resha,* 610 So.2d 460 (Fla.App. 1 Dist. 1992); *Pizzato's Inc. v. City of Berwyn,* 523 N.E.2d 51 (Ill.App. 1 Dist. 1988); *Klindtworth v. Burkett,* 477 N.W.2d 176 (N.D. 1991); *Ohio Civil Service Employees Ass'n v. Moritz,* 529 N.E.2d 1290 (Ohio App. 1987); *Noyola v. Flores,* 740 S.W.2d 493 (Tex.App. Corpus Christi 1987). Georgia would be the sixth state to reject a public official's right to an immediate appeal following an adverse determination of qualified immunity.

This Court has never resolved the question of whether a state court must entertain an action brought pursuant to 42 U.S.C. § 1983. *See Howlett v. Rose,* 496 U.S.

356, 378 (1990); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). However, if a state chooses to provide a forum for Section 1983 actions, it may not elevate state procedures over federal law in that area. *Felder v. Casey*, 487 U.S. 131 (1988). The conflict which currently exists in the states concerning the availability of immediate appellate review of adverse qualified immunity determinations results in a non-uniform treatment of Section 1983 causes of action depending on whether the action is brought in state or federal court. Petitioners are confident that making a public official's right to a pre-trial determination of qualified immunity dependent upon the vagaries of appellate procedure in fifty different states was not this Court's intention when it decided *Mitchell v. Forsyth*, 472 U.S. 511 (1985). This case provides the Court a vehicle to assure that all states uniformly afford public officials the full range of protection which qualified immunity was intended to provide.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted and the judgment of the Supreme Court of Georgia reversed.

Respectfully submitted,

MICHAEL J. BOWERS 017650
Attorney General

WILLIAM C. JOY 405500
Senior Assistant Attorney General

WILLIAM M. DROZE 231039
Assistant Attorney General

Please Address All
Communications To:

WILLIAM M. DROZE
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3303

Counsel of Record

APPENDIX

In the Supreme Court of Georgia DEC 5 1994

Decided:

S94A1614, S94A1615. TURNER et al. v. GILES.

CARLEY, Justice.

Appellee-plaintiff is a blind vendor who holds a license from the state pursuant to 20 U.S.C. §§ 107 et seq., the Randolph-Sheppard Act. Although appellant-defendant state employees originally terminated appellee's license without affording him an evidentiary hearing, a post-termination evidentiary hearing did result in the reinstatement of appellee's license and the award to him of back pay. After reinstatement of his license, appellee filed this action, alleging that appellants had denied him due process of law and were liable for damages under 42 U.S.C. § 1983. Appellants moved to dismiss on various grounds, but the trial court denied their motion. In Case Number S94A1614, appellants appeal directly from the trial court's order denying their motion to dismiss and, in Case Number S94A1615, they appeal from that order pursuant to this court's grant of their application for interlocutory appeal.

CASE NUMBER S94A1614.

1. One of the grounds of appellants' unsuccessful motion to dismiss was their claim of qualified immunity to appellee's § 1983 action. Under federal law, appellants would be entitled to a direct appeal from an adverse pretrial determination as to that issue. *Mitchell v. Forsyth*, 472 U.S. 511 (105 SC 2806, 86 LE2d 411) (1985). However, the jurisdiction of the courts of Georgia is not a federal issue upon which the decision of the Supreme Court of

the United States in *Mitchell* would be controlling, but derives from the constitutional and statutory law of this state.

> It is a legislative function to establish the jurisdictional requirements for the appealability of cases. The appellate courts have heretofore given due consideration to the finality requirement which otherwise serves as a statutory limitation on direct appealability. Neither *Hubbard [v. State,* 254 Ga. 694 (333 SE2d 827) (1985)], nor *Smith [v. State,* 169 Ga. App. 251 (312 SE2d 375) (1983)], are authority for the proposition that the denial of any and all motions to dismiss would be directly appealable. The direct appealability of interlocutory orders remains the exception rather than the rule.

In the Interest of M.O.B., 190 Ga. App. 474, 475-476 (378 SE2d 898) (1989).

> In this state, it has been recognized
>
> "that 'a broader construction' of direct appealability 'is appropriate where the order appealed from is one denying a plea of double jeopardy(,)' " and that the denial of an OCGA § 17-7-170 motion is such an order. [Cit.]

In the Interest of M.O.B., supra at 476. It is clear, however, that appellants' claim of qualified immunity is not analogous

> to a claim of double jeopardy so as to entitle [them] to a direct appeal under the authority of *Patterson,* 248 Ga. 875 (287 SE2d 7) (1982), or *Smith v. State,* [supra]. Obviously, there has been

> no prior adjudication favorable to the appellant[s] in the present case, by operation of law or otherwise.

Austin v. State, 179 Ga. App. 235 (345 SE2d 688) (1986). See also *In the Interest of M.O.B.*, supra at 475.

Moreover, an order denying a claim of qualified immunity in a § 1983 action is not substantially separate from the issues raised by the complaint. Compare *Scroggins v. Edmondson*, 250 Ga. 430, 432 (1) (c) (297 SE2d 469) (1982). Indeed, the basic issue is substantially identical: A § 1983 complaint alleges that the defendant violated federal law, whereas the defendant's claim of qualified immunity asserts that clearly established federal law was not violated. See *Harlow v. Fitzgerald*, 457 U.S. 800 (102 SC 2727, 73 LE2d 396) (1982). Likewise, a pre-trial denial of a claim of qualified immunity is not effectively unreviewable on appeal. Compare *Scroggins v. Edmondson*, supra at 432 (1) (c). If a claim of qualified immunity is unsuccessful, appellate review is merely delayed until final judgment, as is true with regard to other interlocutory orders which are not directly appealable under OCGA § 15-6-34 (a).

Accordingly, we decline to adopt the federal rule permitting a direct appeal from an adverse pretrial determination of the issue of qualified immunity in a § 1983 action. Nevertheless, we recommend that, except in clear cases, the trial courts issue a certificate of immediate review under OCGA § 5-6-34 (b) for interlocutory orders denying dismissal or judgment on the basis of qualified immunity. See *Phillips Constr. Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488, 490 (299 SE2d 538) (1983). The trial court did certify its order in the instant case, and we granted

appellants' application for interlocutory appeal in Case Number S94A1615. We have jurisdiction over that interlocutory appeal, but appellants' direct appeal is dismissed.

CASE NUMBER S94A1615.

2. One ground of appellants, unsuccessful motion to dismiss is the trial court's asserted lack of subject matter jurisdiction over appellee's § 1983 action. In urging that this ground is meritorious, appellants rely upon the 1990 amendment to Art. I, Sec. II, Par. IX (d) of our state constitution, which provides, in relevant part, that state officers and employees "shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions."

It is clear that, prior to the 1990 constitutional amendment, the courts of this state did have subject matter jurisdiction over § 1983 claims. *Wyman v. Popham*, 252 Ga. 247, 249 (3) (1984). The availability of an immunity defense for a specific class of defendants is obviously an entirely separate and distinct topic from the general subject matter jurisdiction of this state's courts. By its terms, the 1990 constitutional amendment addresses only the immunity defense of state officers and employees to state-based claims, not the authority of this state's courts to hear federally-based claims against state officers and employees. Thus, that amendment cannot be construed as removing subject matter jurisdiction over § 1983 claims from the courts of Georgia. The courts of this state continue to have subject matter jurisdiction over § 1983

claims against state officers and employees and the consequent authority to rule on the merits of any defense that might be raised by the state officers and employees to those federally-based claims.

3. Appellants urge that appellee has no property interest in his license which would be subject to constitutional protection under the Fourteenth Amendment.

Applicable federal law requires a state to issue a license for an indefinite period and permits termination only if the vending facility is not being operated in accordance with prescribed rules and regulations. 20 U.S.C. § 107a (b); 34 C.F.R. § 395.7 (b). Thus, appellee's license is a property right. See *State Bd. of Education v. Drury*, 263 Ga. 429, 431 (1) (1993); *Wills v. Composite State Bd. of Medical Examiners*, 259 Ga. 549, 551 (3) (1989); *Copsey v. Swearingen*, 762 FSupp. 1250, 1260 (10) (M.D. La. 1991) (assuming that a blind vendor's state-issued license is a property right).

4. After an evidentiary hearing which comported with procedural due process, appellee's license was reinstated and he was awarded back pay. Appellants urge that, under these circumstances, appellee has no viable § 1983 claim.

> In *Parratt v. Taylor*, 451 U.S. 527 (101 SC 1908, 68 LE2d 420) (1981), the Supreme Court held that in order for the conduct of a state official to give rise to a constitutional due process violation, the official must have acted in accordance with established policy rather than in defiance of it, with the result that available state remedies are not themselves adequate to provide the claimant with redress for the

> alleged injury. Otherwise, the Court ruled, the requirements of due process will be deemed satisfied "(a)lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983. . . . " [Cits.] The adequacy of the state remedy in this case has been conclusively established by the fact that it resulted in [appellee's] reinstatement with back pay. . . . It follows that [appellee] has no remaining cause of action for damages for violation of [his] procedural due process rights under 42 USC § 1983. [Cit.]

Henderson v. Sherrington, 189 Ga. App. 498, 499 (2) (376 SE2d 397) (1988). See also *Hudson v. Palmer*, 468 U.S. 517, 533-534 (104 SC 3194, 82 LE2d 393) (1984); *City of Cave Spring v. Mason*, 252 Ga. 3 (310 SE2d 892) (1984); *Copsey v. Swearingen*, supra at 1260-1261 (10). Therefore, the order of the trial court denying appellants' motion to dismiss is reversed.

5. Appellants' remaining contentions are moot and need not be addressed.

Appeal dismissed in Case Number S94A1614, Judgment reversed in Case Number S94A1615. All the Justices concur, except Hunt, C.J., concurs in the judgment only.

SUPREME COURT OF GEORGIA

ATLANTA June 14, 1994

TO ALL COUNSEL:

RE: Application No. S94I1293, *James P. Turner et al v. James A. Giles*

The Supreme Court today granted the above referenced application for interlocutory appeal.

The appellant's notice of appeal must be filed in the trial court within ten days of the date shown above. Once the record is received from the trial court and docketed in this Court notices will be mailed to all counsel showing the date of docketing and the case number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days of docketing; the appellee's briefs will be due within 40 days of docketing or within 20 days of the filing of the appellant's brief, whichever is later (see Rules 39 & 40).

This Court is particularly concerned with, and requests that you address in your brief, the following:

1. Does Art. I, Sec. II, Para IX(d) of the 1983 Georgia Constitution remove subject-matter jurisdiction over claims brought under 42 U.S.C. § 1983 from the courts of Georgia?

2. Is Giles' license to operate a vending facility a property right which is subject to constitutional protection?

3. If Giles has a state-created property interest in the vending license, is he entitled to more than procedural due process? See *McKinney v. Pate*, ___ F3d ___ (Case No. 91-3416, decided May 5, 1994 (11th Cir.)

4. Are petitioners shielded from suit by the doctrine of qualified immunity? See *Hanson v. Soldenwagner*, 19 F3d 573 (11th Cir. 1994).

5. Should a trial court's decision on the applicability of the doctrine of qualified immunity be entitled to direct appeal?

6. Did Congress, by passage of 20 USC §§ 107d-1 and 2, intend to foreclose use of 42 USC § 1983 by vendors licensed under the Randolph-Sheppard Act?

Sherie M. Welch, Clerk

By: /s/ Lynn M. Stinchcomb

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

JAMES A. GILES, Plaintiff, vs. JAMES P. TURNER, GRADY KEITH, CYNTHIA D. BROWN, and PEGGY ROSSER, Defendants.	*	Civil Action File No. 93-5620-7 (Filed May 11, 1994)

CERTIFICATE OF IMMEDIATE REVIEW

In accordance with the interlocutory appeal procedure set forth in O.C.G.A. § 5-6-34(b), the Court hereby certifies that its Order of May 2, 1994 is of such importance to the case that immediate review should be had.

/s/ Daniel M. Coursey
DANIEL M. COURSEY, Judge
Superior Court of DeKalb County
Stone Mountain Judicial Circuit

PRESENTED BY:

William M. Droze
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3303

Attorney for Defendants

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

JAMES A. GILES, Plaintiff, v. JAMES P. TURNER, GRADY KEITH, CYNTHIA D. BROWN and PEGGY ROSSER, Defendants.	:	Civil Action File No. 93-5620-7 (Filed May 2, 1994)

ORDER

The plaintiff in this case operated a vending facility in the Crown Road Post Office under the Randolph-Sheppard Act ("RSA"). This Act, codified at 20 U.S.C. § 107, *et seq.*, was designed to provide employment opportunities to blind vendors. Plaintiff had been a vendor under the RSA for twenty-seven years. Defendants are employed by the Georgia Department of Human Resources to supervise the vendors under the Act. Defendant Brown is employed as a Business Enterprise Supervisor and oversees fourteen vendors at eleven facilities. She began to supervise plaintiff in June of 1988. Defendant Keith supervises defendant Brown and nine other supervisors. Defendant Turner is the Director of the Business Enterprise Program of the Rehabilitation Services, and defendant Rosser is the Deputy Division Director of the Rehabilitation Services.

The Crown Road facility, for a number of years, had a lower than expected percentage of profit. Plaintiff believed that this problem could be traced to customer

theft. He discussed with defendant Brown the installation of security cameras in the vending facility and in the office area. They agreed that the cameras would be installed in the facility itself, and, after one month of monitoring, no customer theft was revealed. Cameras were then installed in plaintiff's office, without his knowledge, sometime in June of 1991.

The security company monitoring the cameras notified defendant Brown of allegedly suspicious activity, including plaintiff placing cash in his wallet. On August 7, 1991, defendants Brown, Keith and Turner reviewed these surveillance tapes. One week later, on August 15, defendants Turner and Brown reviewed the surveillance tapes again, and the Office of Fraud and Abuse was contacted. After continued monitoring, the Office of Fraud and Abuse issued a report which stated that it was unable to substantiate any theft from the facility by plaintiff, but the report did state that plaintiff was making undocumented loans from the facility proceeds. An estimate of profits also was done on plaintiff's facility. This estimate allegedly revealed a deficit of $253,000.00 in projected profits. Plaintiff disputes this figure and the general accuracy of this estimate.

Immediately thereafter, defendants Brown and Keith recommended that plaintiff's license be terminated. This recommendation was approved by defendant Turner, and on January 17, 1992, defendant Brown issued a termination letter to plaintiff. On February 5, 1992, plaintiff requested administrative review of the termination decision. Defendant Turner held the administrative hearing and upheld the decision. Plaintiff then requested a full

evidentiary hearing. On November 11, 1992, the Administrative Law Judge ordered that plaintiff be reinstated and ordered backpay from the date of his termination to the date of reinstatement. The ALJ's decision was appealed, but the Commissioner of the Department upheld the reinstatement and award of backpay. Plaintiff has been reinstated and given his full backpay of $36,766.90.

Plaintiff filed this action in this court under 42 U.S.C. §1983 alleging that his rights under 34 C.F.R. § 395.7 and his Fourteenth Amendment due process rights were violated when he was terminated without a prior hearing. This case is currently before the court on defendants' motion to dismiss. Defendants assert several grounds in their motion, and each will be addressed by this court in turn.

A. Involvement of Defendant Rosser.

Initially, this court notes that plaintiff has admitted in his response to defendants' motion, that defendant Rosser's involvement in the termination of his license is unclear. Under the regulations of the Georgia DHR, defendant Rosser should have been contacted before the decision against plaintiff was made. However, because discovery has been stayed in this case, plaintiff has been unable to determine whether Ms. Rosser was actually involved. In light of these facts, this court dismisses the motion to dismiss Ms. Rosser as premature. If, after necessary discovery has been completed by the plaintiff, it appears that Ms. Rosser was not involved in the decision to terminate plaintiff's license, Ms. Rosser may refile her motion to dismiss.

B. Service of Process.

Defendants asserted that this case should be dismissed because they were improperly served. At the hearing on this motion, however, plaintiff presented an order appointing a process server, and defendants waived this objection.

C. Lack of Subject Matter Jurisdiction.

Defendants argue that this court should dismiss this action because the Georgia Constitution and the Tort Claims Act limit the liability of state employees and remove this type of suit from this court's jurisdiction. Plaintiff argues, however, that this is not an action brought under State law and subject to the Georgia Tort Claims Act. Instead, plaintiff asserts, this is an action based on a federal statute, and this court has concurrent jurisdiction to hear this action. This court agrees with plaintiff and finds that the Georgia Constitution and the Georgia Tort Claims Act do not remove this §1983 action from the jurisdiction of this court.

The Georgia courts have rejected the argument that immunity under the Georgia Constitution deprives superior courts of jurisdiction to hear §1983 actions. In *City of Cave Spring v. Mason*, 252 Ga. 3 (1984) the Georgia Supreme Court stated that "claims by persons allegedly deprived of their constitutional rights under color of State law or custom may be maintained under [§1983] despite any governmental immunity claimed if facts are pleaded and proved in support of the claim . . . " The court went on to hold that a §1983 action could lie in the

superior court if plaintiff alleged an intentional deprivation of his or her Constitutional rights based on an impermissible policy. *Id.* at 5; *see also, Wyman v. Popham*, 252 Ga. 247, 249 (1984); *Holloway v. Rogers*, 181 Ga. App. 11, 13 (1986).

Defendants contend that the recent amendment of the Georgia sovereign immunity provisions in the Georgia Constitution and the enaction of the Georgia Tort Claims Act changes this settled rule of concurrent jurisdiction. This argument has no merit. The Georgia Court of Appeals, in two recent cases, reaffirmed the concurrent jurisdiction of superior courts to hear §1983 claims. The Court stated in *Thurmond v. Richmond County Bd. of Educ.*, 207 Ga. App. 437, 440 (1993), that "[e]ven though the governing body of a public agency . . . has sovereign immunity under state law, a §1983 claim may be asserted against it." *See also, Collins v. Dep't of Transp.*, 208 Ga. App. 53 (1993). For the above reasons, this court denies defendants' motion to dismiss on this ground.

D. Ante-Litem Notice.

Defendants next argue that plaintiff has not provided sufficient ante-litem notice under O.C.G.A. § 50-21-26, and his claim must be dismissed. Plaintiff, however, contends that the ante-litem notice provisions in the Georgia statute do not apply to §1983 actions. This court agrees with plaintiff.

First, O.C.G.A. § 50-21-26(a) states, "[n]o person, firm, or corporation having a tort claim against the state

under this article shall bring any action against the state . . . without first giving notice of the claim . . . (Emphasis added)." Clearly, the ante-litem statute, on its face, applies only to actions brought against the state under the Georgia Torts Claim Act. Further, a long line of decisions in several courts have rejected the argument these defendants now make. Specifically, the defendant in *Ehlers v. City of Decatur,* 614 F.2d 54 (5th Cir. 1980), asserted the same argument that defendants now assert. The city argued that the statutory notice requirements for suits against municipalities must be met before bringing a §1983 action. The *Ehlers* court succinctly held that a plaintiff could not be forced to satisfy state administrative notice procedures before bringing a federal cause of action and, therefore, Georgia's ante-litem notice requirements may not constitutionally be applied to §1983 actions. *See also, Majette v. O'Connor,* 811 F.2d 1416 (11th Cir. 1987); *Booker v. City of Atlanta,* 586 F.Supp. 340 (N.D. Ga. 1984); *City of Atlanta v. J.A. Jones Construction Co.,* 195 Ga. App. 72 (1990). For the above reasons, this court denies defendants' motion to dismiss on this ground.

E. Immunity: Absolute and Qualified.

Defendants also argue that this action should be dismissed because they are entitled to absolute immunity under *Butz v. Economou,* 438 U.S. 478 (1978). In the alternative, defendants argue that they are entitled to qualified immunity and this case should be dismissed because no evidence exists that they violated a clearly established right. According to defendants, granting plaintiff a full evidentiary hearing after his license was terminated gave

plaintiff opportunity to be heard in a meaningful time and manner. In response, plaintiff asserts that defendants are not entitled to absolute immunity because they were not acting as judges or prosecutors. Instead, plaintiff argues that defendants were taking administrative action against him when they terminated his license under the RSA. Further, plaintiff argues that the defendants are not entitled to qualified immunity because the law is clear that it is necessary to grant an individual a prior hearing before revoking his or her property interest in a license. Plaintiff does not dispute the assertion that defendants were acting in their discretionary authority.

(1) Absolute Immunity.

Initially, this court finds that defendants are not entitled to absolute immunity for their termination of plaintiff's license. Throughout its decisions dealing with the immunity of officials, the United States Supreme Court has emphasized a "functional" approach. *See, e.g., Forrester v. White*, 484 U.S. 219 (1987); *Harlowe* [sic] *v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou, supra.* If the nature of the function with which the official has been entrusted is judicial, prosecutorial, or legislative, then that official may be entitled to immunity. However, the Court also has been wary of extending absolute immunity beyond its current, limited scope. In fact, the Court in *Butz, supra*, stated that "in a suit for damages arising from unconstitutional action, [officials] exercising discretion are entitled only to qualified immunity . . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential." *Id.* at 507.

Although defendants rely on *Butz* for their assertion that they are entitled to absolute immunity, the controlling factors present in *Butz* are not present in this case. The Court emphasized that the officials in *Butz* were entitled to immunity because the functions that they performed were judicial in nature. They involved adversary proceedings conducted before a trier of fact, evidence was presented, and findings of fact were made by the hearing officer. Similarly, the agency officer who made the decision to instigate the proceedings was granted absolute immunity because the function performed was similar to a prosecutor.

In the case at bar, the defendants were not acting in a judicial or prosecutorial role. There were no aspects to the decision to terminate plaintiff which resembled a judicial or prosecutorial function. Defendants simply made a unilateral and administrative decision to terminate plaintiff's license. It is settled law that "[a]dministrative decisions . . . have not similarly been regarded as judicial acts." *Forrester, supra* at 228. For these reasons, this court finds that defendants are not entitled to dismissal of this action on the basis of absolute immunity.

As to plaintiff's claim that defendant Turner additionally violated his due process rights when Turner allegedly participated in the termination decision and conducted the administrative review of that decision, the defendants have presented no evidence as to the nature of the review. Since there is no evidence that the review was functionally equivalent to a judicial hearing, this court denies defendants' motion to dismiss these additional claims against defendant Turner as well.

(2) Qualified Immunity and the Right to a Pre-Termination Hearing.

Under *Harlowe* [sic] *v. Fitzgerald,* supra at 818, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known [Cits.]" In effect, *Harlowe* [sic] establishes a two-part test. First, this court must find that the defendants were acting within their discretionary authority. Neither party contests this fact. Second, plaintiff must show that the defendants violated a clearly established constitutional right. In order for the plaintiff to meet this burden, he need only show that sufficient case law existed to establish the contours of the right so that a reasonable officer, in the same circumstances and with the same knowledge as the defendants, would have known of the unlawfulness of the defendants' conduct. *Nicholson v. Dep't of Human Resources,* 918 F.2d 145, 147 (11th Cir. 1990). If the law is clearly established, then the defense of qualified immunity should fail. *Harlowe* [sic] at 818-819.

Defendants do not argue that plaintiff did not have a property interest in his license under the RSA. Instead, they assert that the post-termination hearing granted to plaintiff was sufficient to fulfill his due process rights under the Fourteenth Amendment. Plaintiff argues that it is clearly established that there must be a pre-termination hearing before his license was revoked.

Although the establishment of a property interest is a matter of state law, the process due plaintiff before termination of his license is a matter of federal constitutional

law. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1984). The fundamental right of procedural due process is that the plaintiff be given the opportunity to be heard in a meaningful time and manner. *Armstrong v. Manzo,* 380 U.S. 545 (1965). The Supreme Court has overwhelmingly interpreted this requirement to mean that an individual is entitled to some type of hearing *before* his life, liberty, or property rights are terminated. *See, Loudermill, supra; Barry v. Barchi,* 443 U.S. 55 (1979); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Bodie v. Connecticut,* 401 U.S. 371 (1971); *Bell v. Burson,* 402 U.S. 535 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969). This hearing need not be a full evidentiary hearing, and the requirements of due process may be satisfied by a simple opportunity to respond orally or in writing. *E.g., Mathews, supra* at 343; *Loudermill, supra* at 545; *Bodie, supra* at 378.

There are some Supreme Court decisions which indicate that, in certain limited circumstances, a post-deprivation hearing may be sufficient to satisfy due process. These cases arise in situations where it is necessary for the state to act quickly or where it is impracticable or impossible for the state to provide a pre-deprivation hearing. *See, e.g., Parratt v. Taylor,* 451 U.S. 527 (1981).

Based on the above law, this court must decide whether a reasonable state officer would be aware of a clear legal right to a pre-termination hearing where the state agency has initiated administrative action against an individual with the object of terminating his license to operate a facility. This court finds that a reasonable state officer would have been aware of a clear legal right to

some opportunity to be heard *prior* to the termination and denies defendants' motion to dismiss on this ground.

The Supreme Court has been very clear that absent the special circumstances outlined in *Parratt*, an individual is entitled to an opportunity to be heard before the termination of his life, liberty, or property rights. Clearly, the special circumstances found in *Parratt* do not exist in this case. Over seven months passed between the time defendants installed the cameras in plaintiff's office and the decision to terminate his license. Additionally, the defendants do not assert that quick action by them was necessary, nor do they argue that it would have been impossible or impracticable to provide a pre-termination opportunity to be heard.

This court is aware that a district court in Louisiana held that the post-termination remedies under the RSA are sufficient to fulfill the plaintiff's due process rights. *Copsey v. Swearingen*, 762 F.Supp. 1250 (M.D. La. 1991). Defendants urge this court to reach the same conclusion in this case, but this court declines to do so. The question before this court on defendants' motion to dismiss is whether a clear legal right exists which grants plaintiff some opportunity to be heard before his license was terminated. This court finds that there was a clear legal right to such a pre-termination opportunity to be heard.

Since it is well established that the Supreme Court requires some opportunity to be heard before a property interest is terminated, this court finds that defendants are not entitled to the defense of qualified immunity. For these reasons, defendants' motion to dismiss on this ground is denied.

G. Failure to State a Claim

Defendants also argue the plaintiff's complaint should be dismissed because a State is not required to give an individual a hearing before revoking a license under the RSA, §§ 107b(6) and 107d-1. According to defendants, the other statute relief on by plaintiff, 34 CFR § 395.7, is simply a procedural rule and does not confer on plaintiff any substantive right to a pre-termination hearing. Plaintiff argues, however, that his § 1983 action is based on his Fourteenth Amendment right to due process and a hearing before his property right in his license is terminated.

Section 1983 provides a remedy for "the deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. It is clear that an alleged violation of an individual's Fourteenth Amendment due process rights will sustain an action under § 1983 without the necessity of making any additional claims under federal or state statutes. Although allegations of *negligent* violation of an individual's due process rights under the Fourteenth Amendment are not sufficient to sustain a § 1983 action, *Daniels v. Williams*, 474 U.S. 327 (1986), there has never been any question that an *intentional* deprivation of procedural due process under the Fourteenth Amendment is sufficient, without more, to sustain a § 1983 action.

In the case at bar, plaintiff has alleged that the defendants violated both 34 CFR § 395.7 and his Constitutional rights by refusing to provide a pre-termination hearing. Complaint, para. 23-27. Further, plaintiff alleges that the asserted violation of his Constitutional rights was done

maliciously, recklessly and knowingly. Complaint, para. 25, 27, 42-45. Construing all ambiguities in the pleadings in plaintiff's favor, it appears that plaintiff has pled a § 1983 action under both a federal statute and the Constitutional right to due process. Because the allegations of a Constitutional violation are sufficient without more, to sustain a § 1983 action, this court declines to address the question of whether 34 CFR § 395.7 gives the plaintiff a substantive right to a pre-termination hearing. For the above reasons, this court denies defendants' motion to dismiss on this ground.

H. Exclusivie [sic] Arbitration Remedy Under the RSA.

Finally, defendants argue that the RSA contains an exclusive arbitration remedy for any licensee who is "dissatisfied with any action arising from the operation or administration of the vending facility program . . . " 20 U.S.C. § 107d-1(a). They argue that the arbitration remedy is a comprehensive remedy and demonstrates Congressional intent to foreclose a § 1983 action by dissatisfied licensees. In support of this argument, defendants point to several cases from other circuits which hold that an individual cannot bring suit directly in federal court before exhausting the arbitration procedures. In response, plaintiff argues that recourse to § 1983 cannot be foreclosed without express provisions in the Act denying that remedy. Further, plaintiff asserts that the punitive damages he seeks in this action are not available through arbitration. Plaintiff alleges in this suit that his Constitutional due process rights and rights under the RSA were violated when he was not given a hearing before his license was terminated.

Defendants' cases do indicate that Congress intended to foreclose a § 1983 action for violations of the Act itself. *See, Randolph-Sheppard Vendors of America v. Weinberger,* 795 F.2d 90 (D.C. Cir. 1986). There is no indication in these cases, however, that Congress intended to foreclose a § 1983 action for Constitutional due process violations, especially where that due process right is a fundamental one and the deprivation of it may result in irreparable injury. This rationale has been used in other jurisdictions under other federal statutes with similar administrative procedures to the RSA. *See, e.g., Digre v. Roseville Schools,* 841 F.2d 245 (8th Cir. 1988) ("maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme." *Quoting, Smith v. Robinson,* 468 U.S. 992 (1984)); *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984) (claim under EAHCA requires exhaustion of administrative remedies, but due process claim under § 1983 does not require exhaustion of remedies). It is incongruous to suggest that an individual's remedy for violation of his Constitutional rights is barred by a failure to submit the Constitutional issue to administrative review. For the above reasons, this court denies defendants' motion to dismiss plaintiff's Constitutional claims under the Fourteenth Amendment for violation of his due process rights. This court does find, however, that any claims brought under the RSA or 34 CFR § 395.7 should be dismissed for failure to exhaust administrative remedies.

In conclusion, the motion to dismiss of defendants Turner, Keith and Brown is granted only as to plaintiff's claims under the RSA and 34 CFR § 395.7. The motion is denied as to all other claims by plaintiff.

SO ORDERED this 29th day of April, 1994.

/s/ Daniel M. Coursey, Jr.
Daniel M. Coursey, Jr.
Judge, DeKalb County
Superior Court

copies sent to:
William M. Droze, Esq.
Brian Spears, Esq.
Fredrick J. Kraus, Esq.

[SEAL] **SUPREME COURT OF GEORGIA**
Case Nos. S94A1614, S94A1615

DEC 20 1994

Atlanta

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAMES P. TURNER et al. v. JAMES A. GILES

Upon consideration of the Motions for Reconsideration filed in these cases, it is ordered that they be hereby denied.

[SEAL] **SUPREME COURT OF THE STATE OF GEORGIA,**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb,
Chief Deputy Clerk

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

JAMES A. GILES, Plaintiff,	*	
vs.	*	Civil Action File No. 93-5620-7
JAMES P. TURNER, GRADY KEITH, CYNTHIA D. BROWN, and PEGGY ROSSER, Defendants.	*	(Filed June 15, 1994)

NOTICE OF APPEAL

COME NOW James P. Turner, Grady Keith, Cynthia D. Brown, and Peggy Rosser, Defendants in the above-styled proceeding, and give notice of their intention to appeal the May 2, 1994 order of this Court in the above-styled matter to the Supreme Court of Georgia. These defendants respectfully request that the Clerk of the Court omit nothing from the record on appeal. The transcript of the motion hearing held September 28, 1993, will be filed for inclusion in the record for appeal. The Clerk is requested to include in the record a copy of the June 14, 1994 Order of the Supreme Court authorizing this interlocutory appeal in *Turner et al. v. Giles*, Case No. S94I1293. *See* Exhibit 1.

This 15th day of June, 1994.

Respectfully submitted,

MICHAEL J. BOWERS 017650
Attorney General

(Signatures Continued Next Page)

/s/ William C. Joy
WILLIAM C. JOY 405500
Senior Assistant Attorney General

/s/ W. M. Droze
WILLIAM M. DROZE 231039
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

WILLIAM M. DROZE
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3303

SUPREME COURT OF GEORGIA

ATLANTA June 14, 1994

TO ALL COUNSEL:

RE: Application No. S94I1293, *James P. Turner et al v. James A. Giles*

The Supreme Court today granted the above referenced application for interlocutory appeal.

The appellant's notice of appeal must be filed in the trial court within ten days of the date shown above. Once the record is received from the trial court and docketed in this Court notices will be mailed to all counsel showing the date of docketing and the case number assigned. The appellant's enumeration of errors and briefs will be due

in this Court within 20 days of docketing; the appellee's briefs will be due within 40 days of docketing or within 20 days of the filing of the appellant's brief, whichever is later (see Rules 39 & 40).

This Court is particularly concerned with, and requests that you address in your brief, the following:

1. Does Art. I, Sec. II, Para IX(d) of the 1983 Georgia Constitution remove subject-matter jurisdiction over claims brought under 42 U.S.C. § 1983 from the courts of Georgia?

2. Is Giles' license to operate a vending facility a property right which is subject to constitutional protection?

3. If Giles has a state-created property interest in the vending license, is he entitled to more than procedural due process? See *McKinney v. Pate*, ___ F3d ___ (Case No. 91-3416, decided May 5, 1994 (11th Cir.)

4. Are petitioners shielded from suit by the doctrine of qualified immunity? See *Hanson v. Soldenwagner*, 19 F3d 573 (11th Cir. 1994).

5. Should a trial court's decision on the applicability of the doctrine of qualified immunity be entitled to direct appeal?

6. Did Congress, by passage of 20 USC §§ 107d-1 and 2, intend to foreclose use of 42 USC § 1983 by vendors licensed under the Randolph-Sheppard Act?

Sherie M. Welch, Clerk

By: /s/ Lynn M. Stinchcomb

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing NOTICE OF APPEAL, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Fredrick J. Kraus, Esq.
Kraus & Spears
One PrimeBank Plaza
Suite 600
101 West Ponce de Leon Avenue
Decatur, Georgia 30030

G. Brian Spears, Esq.
233 Mitchell Street, S.W.
Suite 400
Atlanta, Georgia 30303-3300

This 15th day of June, 1994.

/s/ W. M. Droze
WILLIAM M. DROZE
Assistant Attorney General

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

JAMES A. GILES,	*	
	*	
Plaintiff,	*	Civil Action File
vs.	*	No. 93-5620-7
	*	
JAMES P. TURNER, GRADY KEITH, CYNTHIA D. BROWN, and PEGGY ROSSER,	*	(Filed June 1, 1994)
	*	
	*	
Defendants.	*	

NOTICE OF APPEAL

COME NOW James P. Turner, Grady Keith, Cynthia D. Brown, and Peggy Rosser, Defendants in the above-styled proceeding, and give notice of their intention to appeal the May 2, 1994, order of this Court in the above-styled matter to the Supreme Court of Georgia. These defendants respectfully request that the Clerk of the Court omit nothing from the record on appeal. The transcript of the motion hearing held September 28, 1993, will be filed for inclusion in the record for appeal.

Defendants recognize that an application for interlocutory appeal is presently pending before the Supreme Court of Georgia, *Turner et al. v. Giles*, Case No. S94I1293. Nevertheless, they maintain that such portions of the Court's order affecting their defense of qualified immunity are appealable as a matter of right pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). Accordingly, out of an abundance of caution, this notice of appeal is

made as a protective filing in accordance with that good faith belief.

Respectfully submitted,

MICHAEL J. BOWERS 017650
Attorney General

/s/ William C. Joy
WILLIAM C. JOY 405500
Senior Assistant Attorney General

/s/ W. M. Droze
WILLIAM M. DROZE 231039
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

WILLIAM M. DROZE
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3303

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing NOTICE OF APPEAL, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Fredrick J. Kraus, Esq.
Kraus & Spears
One PrimeBank Plaza
Suite 600
101 West Ponce de Leon Avenue
Decatur, Georgia 30030

G. Brian Spears, Esq.
233 Mitchell Street, S.W.
Suite 400
Atlanta, Georgia 30303-3300

This 31st day of May, 1994.

/s/ W. M. Droze
WILLIAM M. DROZE
Assistant Attorney General